# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>May 18, 2010 |
| v | No. 290028<br>Wayne Circuit Court |
| MICHAEL MCINTOSH,<br><br>Defendant-Appellant. | LC No. 07-011061-FC |

Before: MURPHY, C.J., and K. F. KELLY and STEPHENS, JJ.

PER CURIAM.

Defendant entered a plea of nolo contendere to one count of possessing a firearm while committing a felony (felony-firearm), MCL 750.227b, and one count of assault with intent to commit murder, MCL 750.83. He was sentenced to two years' imprisonment for the felony firearm conviction and to 171 months to 70 years' imprisonment for the assault with intent to commit murder conviction. Thereafter, the trial court denied his motion to withdraw the plea and to dismiss the charges. Defendant now appeals by leave granted[1] and we affirm.

## I. BASIC FACTS

In July 2004, defendant repeatedly punched and then shot his girlfriend. He was charged with assault with intent to commit murder, felony firearm, and domestic violence. A warrant was issued and defendant was arraigned on the warrant almost three years later, on June 6, 2007. At that time, defendant was incarcerated and serving a sentence on an unrelated charge at the Michigan Department of Corrections (DOC). On May 21, 2007, the DOC sent the prosecutor a letter informing the prosecutor of defendant's status and requesting a disposition of the charges in the present case.

[1] Initially, this Court denied defendant's delayed application for leave to appeal based on lack of merit in the grounds presented. *People v McIntosh*, unpublished order of the Court of Appeals, entered March 17, 2009 (Docket No. 290028). Defendant appealed this order to the Michigan Supreme Court, which remanded the matter to this Court for consideration as on leave granted. *People v McIntosh*, ___ Mich ___; 771 NW2d 733 (2009).

Defendant was bound over on the charges on June 28, 2007, and arraigned on the information on July 7, 2007. A final conference scheduling hearing was held on September 14, 2007, during which a trial date was set for January 15, 2008. Initially, the trial court wanted to set a date for November 2007, but the prosecution noted that its "entire division is in trial" at that time. The court then suggested the January date and asked both parties if that was "good." Both parties agreed to the January trial date.

On January 4, 2008, defendant moved to dismiss the charges based on a violation of the 180-day rule. The court denied the motion. On the same date, defense counsel indicated that defendant wanted to enter a plea of nolo contendere. In response, the trial court asked the attorneys what the sentencing guidelines were. Both counsels agreed that the preliminarily scored guidelines were "11-1/2 to 18" years, or 138 to 216 months. The court stated, "If he pleads, I'm going to give him the minimum under the guidelines, and I'd let it run together at the time he's doing the other[]" sentences. The trial court proceeded to question defendant regarding defendant's understanding of the plea. The following colloquy occurred, in pertinent part:

> *The Court*. Now, it's my understanding that in exchange for your plea of no contest, the People are going to dismiss [the domestic violence] count . . . . , as well as the case that apparently is still pending over in the 36th District Court. Do you understand that?
>
> *Defendant*. Yes, your Honor.
>
> *The Court*. And I've also told your attorney that the best I can do is to give you the minimum under the guidelines on the assault with intent to murder.
>
> *Defendant*. Yes, your Honor.

The trial court also confirmed, consistently with MCR 6.302(A), that defendant was knowingly and voluntarily entering his plea of no contest. In addition, the trial court informed defendant that by entering a plea, he was giving up his automatic right of appeal and could only appeal by leave granted. The parties agreed to a stipulation of facts and the trial court accepted defendant's plea.

The guidelines were recalculated at the sentencing hearing. Consequently, defendant was sentenced to 171 months to 70 years' imprisonment for the assault with intent to commit murder conviction, as opposed to the original calculation measuring the guidelines at 138 to 216 months, and to two years' imprisonment for his felony-firearm conviction. Thereafter, defendant moved to dismiss the charges and withdraw his plea, again arguing that the 180-day rule had been violated and that his plea had been involuntary. The trial court denied the motion and this appeal followed.

## II. PLEA AGREEMENT

Defendant argues that the trial court erred by denying his motion to withdraw his plea. We review a trial court's decision on a motion to withdraw a plea made after sentencing for an abuse of discretion. *People v Billings*, 283 Mich App 538, 549; 770 NW2d 893 (2009). "The trial court's decision will not be disturbed on appeal absent a clear abuse of discretion that

resulted in a miscarriage of justice." *People v Boatman*, 273 Mich App 405, 406-407; 730 NW2d 251 (2006). Defendant raises two arguments in support of his claim that his plea was involuntarily given. We consider each in turn.

## A. DEFENDANT'S "REASONABLE" BELIEF

Defendant first contends that the trial court mislead him because he reasonably understood the offer of a minimum sentence to mean that he would be sentenced to 138 months' imprisonment for his assault with intent to commit murder conviction, as opposed to the 171 months that he was ultimately sentenced. We disagree. When a defendant decides to plead guilty to a charge, a trial court must ensure that the plea was entered voluntarily, with understanding, and without undue influence. *People v Thew*, 201 Mich App 78, 82; 506 NW2d 547 (1993). Further, when "a trial court accepts a plea induced by [a sentence] agreement . . . , then the terms of the agreement must be fulfilled." *People v Schluter*, 204 Mich App 60, 63; 514 NW2d 489 (1994); MCR 6.302(C)(3). In other words, a defendant is entitled to the benefit of any plea agreement that serves as an inducement for the plea. It follows that a "defendant may withdraw his plea when a sentence agreement . . . will not be satisfied." *People v Siebert*, 450 Mich 500, 510; 537 NW2d 891 (1995).

Here, once defense counsel indicated that defendant wished to plead guilty, the trial court indicated that it would "give [defendant] the minimum under the guidelines." When defendant entered his plea, the trial court confirmed defendant's understanding of the sentencing agreement. The court asked:

> *The Court*. And I've also told your attorney that the best I can do is to give you the minimum under the guidelines on the assault with intent to murder.
>
> *Defendant*. Yes, your Honor.

Subsequently, at sentencing, defendant received the minimum sentence for his crimes. Thus, the trial court followed the terms of the plea agreement. Defendant's assertion that he was promised a sentence of 138 months, but was instead sentenced to 171 months lacks support in the record. It is unequivocal that the sentencing agreement was not for a particular number of months; but rather, was for a sentence that was the minimum under the guidelines. Defendant specifically confirmed that he understood this to be the agreement and this is exactly how defendant was sentenced. Thus, defendant's claim that his plea was involuntarily given because the agreement was for a specific sentence is disingenuous. The trial court did not err by denying defendant's motion to withdraw his plea.

## B. WAIVER OF APPELLATE RIGHTS

Defendant also asserts that his plea was involuntarily because the trial court allegedly mislead defendant regarding his ability to appeal the denial of his 180-day claim. This argument is also without merit. "[A] trial court is not required to advise a defendant of all potential sentencing consequences [and] 'no authority . . . holds collateral consequences should be considered in allowing a defendant to withdraw his guilty plea after having been sentenced.'" *Boatman*, 273 Mich App at 408 (citation omitted). In any case, the trial court in the instant matter properly informed defendant that any appeal from his conviction and sentence would not

be by right, but by leave granted. See MCR 6.302(B)(5). Under the circumstances, the trial court did not abuse its discretion by denying defendant's motion to withdraw his plea.

## III. 180-DAY RULE

Defendant next argues that the trial court erred by denying his motion for dismissal based on the 180-day rule. We disagree. Preserved nonconstitutional error requires reversal only if defendant can show that it is more probable than not that the error caused a miscarriage of justice. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

The 180-day rule, MCL 780.131(1), provides in part:

> Whenever the department of corrections receives notice that there is pending in this state any untried warrant, indictment, information, or complaint setting forth against any inmate of a correctional facility of this state a criminal offense for which a prison sentence might be imposed upon conviction, the inmate shall be brought to trial within 180 days after the department of corrections causes to be delivered to the prosecuting attorney of the county in which the warrant, indictment, information, or complaint is pending written notice of the place of imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or complaint.

The 180-day period begins on the day after the prosecutor receives notice from the DOC that the defendant is incarcerated and awaiting trial on pending charges. *People v Williams*, 475 Mich 245, 256 n 4; 716 NW2d 208 (2006). If an action is not commenced within the 180-day period, a trial court will lose jurisdiction over the case and the matter will be dismissed. MCL 780.133. Importantly, there is no requirement under the rule that trial begin by, or be completed by, the 180 day mark. *People v Davis*, 283 Mich App 737, 741-742; 769 NW2d 278 (2009). Rather, so long as the people make a good faith effort to commence an action within 180 days of receiving a notice of a defendant's incarceration the case will not be dismissed; conversely, if some preliminary action is taken within 180 days but is followed by inexcusable delay or an intent not to bring the matter promptly to trial, the statute "opens the door" for dismissal. *People v Hendershot*, 357 Mich 300, 303-304; 98 NW2d 568 (1959); *Davis*, 283 Mich App at 743-744. Moreover, "a defendant waives review of a claim that the 180-day rule had been violated upon entry of an unconditional guilty plea." *People v Bordash*, 208 Mich App 1, 2; 527 NW2d 17 (1994).

Here, the DOC allegedly provided the prosecutor with notice of defendant's incarceration and requested a disposition of the charges on May 21, 2007. Clearly, the prosecution commenced an action within 180 days of this date. Defendant was arraigned on the warrant on June 6, 2007, and was bound over on the charges after a preliminary examination on June 28, 2007. Several more scheduling hearings were held, the last of which was on September 14, 2007, at which point both defendant and the prosecutor agreed to a trial date of January 15, 2008. The fact that this trial date is outside the 180-day period is immaterial under the circumstances because the prosecutor clearly acted in good faith to bring the case to trial in a timely manner. There is no indication in the record, and indeed defendant points to none, which shows that the delay was inexcusable or intended by the prosecution. Moreover, we note that there is no dispute that defendant plead guilty and that his plea was unconditional. Thus, even if it could be said

that the delay was inexcusable, defendant has waived review of this claim. *Bordash*, 208 Mich App at 2. In addition, defendant affirmatively agreed to a trial date outside the 180-day mark. Thus, defendant has also waived the applicability of the 180-day rule for this reason as well. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). We conclude that the trial court did not err by denying defendant's motion to dismiss.

## IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that counsel was ineffective for allegedly failing to inform defendant that his plea would waive the 180-day rule motion. We disagree. Because defendant did not move for a *Ginther*[2] hearing, our review is limited to mistakes apparent on the record. A defendant claiming ineffective assistance must show that "his counsel's performance was objectively unreasonable and the representation was so prejudicial that he was deprived of a fair trial." *People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001). To show prejudice, a defendant must demonstrate that but for counsel's error, the results of the proceeding would have been different. *Id*. To prevail on his claim, defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Brown*, 279 Mich App 116, 140; 755 NW2d 664 (2008). Further, "in reviewing a claim of ineffective assistance of counsel in the context of a guilty plea, the key issue to be determined is whether the defendant tendered the plea voluntarily and understandingly." *Watkins*, 247 Mich App at 31. "The question is . . . whether the advice was within the range of competence demanded of attorneys in criminal cases." *Thew*, 201 Mich App at 89-90.

At the outset, we note that there is no indication on the record whether counsel informed, or discussed, with defendant the effect of his plea with regard to the 180-day rule. Thus, defendant's allegation is entirely speculative and it cannot be concluded that counsel's performance fell below reasonable professional norms. Moreover, there is also no indication on the record that defendant's plea was involuntarily given. And further, as we have already concluded, the prosecution made good faith efforts to bring the case to trial in a timely manner and any failure on defense counsel's part to inform defendant of the merits the 180-day rule issue would not have prejudiced defendant. Thus, we cannot conclude that defendant was deprived of the effective assistance of counsel.

Affirmed.

/s/ William B. Murphy
/s/ Kirsten Frank Kelly
/s/ Cynthia Diane Stephens

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).